IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Jail Appeal No.1083/2001

Shankar Lal S/o Bahadur Singh
...Accused-Appellant
Versus
The State of Rajasthan through P.P.
...Respondent

Date of Judgment :::: 17th of January, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri N.A. Naqvi, Counsel for accused-appellant
Smt. Nirmala Sharma, P.P., for the State

By the Court:-

Accused-appellant Shankar Lal S/o Bahadur Singh has preferred this jail appeal through the Superintendent, Central Jail, Kota, challenging the order of his conviction dated 5th of November, 2001 passed by the Special Judge (N.D.P.S. Cases), Jhalawar, in Sessions Case No.33/2001, whereby he was convicted under Section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter shall be referred to as 'the NDPS Act') and sentenced to ten years rigorous imprisonment and a fine of Rs.1,00,000/-; in default of payment of fine, to

further undergo one year's additional rigorous imprisonment.

It is relevant to mention that the appellant had also preferred appeal challenging his conviction and sentence awarded under the same impugned order dated 5th of November, 2001, through Shri N.A. Naqvi, Advocate, which was listed before this Court on 23rd of January, 2002. However, in view of the fact that the appellant had already preferred jail appeal and the appeal filed by Shri N.A. Naqvi was barred by limitation, the learned counsel for the appellant made a prayer to withdraw the appeal and contended that he may be allowed to argue the case on behalf of the appellant in jail appeal itself. The prayer of Shri N.A. Naqvi was allowed and the appeal filed by him was dismissed as withdrawn by this court on 23.1.2002, with liberty to him to represent the case of the appellant in the jail appeal.

A charge-sheet in the present case was filed against the appellant under Section 8/21 of the NDPS Act by the S.H.O., Police Station – Kotwali, Jhalawar, in respect of the occurrence dated 23rd of March, 2001. A search of the appellant was conducted and contraband smack was found from his custody weighing 1 gram and 750 milligram, with packing material, the net weight

of which was 1 gram and 500 milligram.

The learned counsel for the appellant, in view of the overwhelming prosecution evidence regarding recovery of contraband from the appellant, did not press the appeal on merits and contended that, in view of lesser quantity of contraband recovered in the case, the maximum sentence, which could have been awarded against the appellant, was only six months whereas he has already remained in jail for five-years nine-months and twenty-five-days, therefore, he should be released forthwith.

The provisions of Section 21 of the NDPS Act were amended by the Parliament by Act 9 of 2001, which came into force with effect from 2nd of October, 2001. The judgment in the present case of the trial court was passed on 5th of November, 2001. By virtue of Section 41 of the Act No.9 of 2001, the amended provisions were made applicable on all the cases pending before the courts. Section 41 of the NDPS (Amendment) Act, 2001 is reproduced as under:-

> "41. **Application of this Act to pending cases**.- (1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the Courts or under investigation at the

> commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:
>
> Provided that nothing in this section shall apply to cases pending in appeal.
>
> (2) For the removal of doubts, it is hereby declared that no Act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force."

Section 21 of the NDPS Act was also substituted by the Act No.9 of 2001 with effect from 2nd of October, 2001. The amended Section 21 is also reproduced as under:-

> "**21. Punishment for contravention in relation to manufactured drugs and preparations**.- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted

thereunder, manufacturers, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable, -

(a) Where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

The Central Government, vide Order No.S.O.1055, Dated 19.10.2001, issued a Notification while

exercising the powers conferred by clause (viia) and (xxiiia) of Section 2 of the NDPS Act, 1985, whereby small quantity and commercial quantity of the contraband were notified. The small quantity of smack i.e. Diacetylmorphine was quantified 5 gram, and commercial quantity as 250 gram, whereas in the present case admittedly 1 gram and 500 milligram Diacetylmorphine was recovered from the possession of the appellant which falls within the small quantity for which as per clause (a) of Section 21, the maximum sentence provided was imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

The appellant was arrested on 23.3.2001 and since then he is in jail and has undergone the sentence of about five-years nine-months and twenty-five-days, whereas he could have been sentenced up-to six months imprisonment only. It appears that the amended provisions were not brought to the notice of the trial court at the time of passing of the order of sentence on 5.11.2001 as amendment came into force with effect from 2.10.2001 only, but it is very unfortunate that the same has not been brought to the notice of this Court also till date by any party.

In view of the above, the order of sentence

passed by the learned trial court is liable to be modified.

In the result, the appeal is partly allowed. The conviction of the appellant is upheld but the order of the learned trial court regarding sentence of imprisonment and fine is modified and the same is reduced to the rigorous imprisonment of six months only. The appellant has already served out the sentence of imprisonment, therefore, it is directed that the appellant be released forthwith in case his custody is not required in any other case.

(Narendra Kumar Jain) J.

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